IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 226

DONALD B. JONES,

Petitioner,

vs.

GRAVERAET YOUNG KAUFMAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent opposes the Petition for Certiorari for the following reasons: *First*, the summary judgment procedures followed by the district court and the court of appeals below were entirely proper in view of the well-established New York substantive law, which all agree is controlling. *Second*, the questions raised pertain to but a small remaining portion of the litigation, since almost all of the parties originally in the same position as Petitioner became bound by a district court decree approving settlements, and those questions are dependent upon facts which recur infrequently and are of little general importance. *Third*, there is no conflict between the decisions below and the pronouncements of the highest New York courts as to the law to be applied to the facts presented; the district court and the court of appeals correctly interpreted the law of New York as expressed in the decisions of the New York courts.

QUESTIONS PRESENTED.

The "Questions Presented" section of the Petition for Certiorari does not set forth accurately the issues presented for review. The Petitioner assumes, improperly, that the courts below "imposed a compromise" on the parties without their consent through the use of summary judgment procedures. The courts below did no such thing. The questions presented should therefore be phrased as follows:

1. In a case in which a remainderman of a trust estate executed assignment instruments governed by New York law, purporting to sell dollar amounts of his remainder interest, and in which the transactions were challenged as usurious under New York law, did the district court and the court of appeals correctly apply the New York law in holding that the assignments should be treated as loans at a legal rate of interest?

2. In such a case, where the district court declined to hold the transactions void for usury summarily, did that court and the court of appeals properly conclude that under New York law the transactions should be treated as loans at legal rates of interest without reaching the question of usury?

3. In such a case, did the district court and the court of appeals properly fashion an equitable remedy under the New York decisions?

4. Where the facts of an assignment transaction like those involved there disclose that their necessary effect is to secure for the assignee an enormous gain over and above legal interest, does the New York law, as the district court and the court of appeals concluded, hold that specific or subjective intent need not be found but that usurious intent may be imputed to parties?

5. On the facts of this case were the district court and the court of appeals justified in following the decisions of the New York Court of Appeals, of the Appellate Divisions, and of the federal courts sitting in New York in the absence of any persuasive data that those decisions no longer represented the law of New York?

STATEMENT OF THE CASE.

In the trial court this litigation involved assignments made by Respondent Graveraet Young Kaufman between 1950 and 1956 aggregating $1,633,250 in face amount. There were eighteen such assignments, which were promptly reassigned by the original assignees to some eighty subassignees. The summary judgment proceedings directly involved in the Petition had to do with five of those assignments, totalling $321,500, under which Petitioner and six other subassignees asserted claims.

On June 24, 1960 a decree was entered by the district court approving and determining to be fair certain agreements of compromise whereby nearly all of the $1,633,250 in assignment claims were disposed of. As a matter of fact, only $33,000 in such claims remain unsettled, and of this total Petitioner is the claimant, under a subassignment, to the extent of $25,000. In addition to Petitioner, there are at most only three or four other subassignees who remain as parties in this cause out of the original total of approximately eighty claimants.

In this connection it should be noted that the six other subassignees who had claims under the five assignments involved in the summary judgment proceedings have settled. Petitioner is therefore the only one of the assignees directly affected by the summary judgment proceedings below who remains as a litigant.

The "Statement of the Case" contained in the Petition,

taken together with the facts set out in the opinion of the Court of Appeals (Pet. Cert. App. A, pp. 18-22) and the statement of facts in the opinion of the district court (R. 595-608), is sufficient for purposes of presenting the issues. With respect to certain of the statements contained in the Petition, however, Respondent believes some clarification is needed.

In answering the Trustee's petition for instructions (cf. Pet. Cert. pp. 3-4) Respondent alleged that the remainder interest could not be assigned by reason of a spendthrift clause and that the assignments were void in violation of the New York usury law. Respondent's answer also asserted that the assignments were "loan transactions in the guise of sales under circumstances calling for the imposition of trust obligations upon the assignees as in the case of equitable mortgages" (R. 50). The district court made express reference to this portion of Respondent's pleading (R. 634, fn. 38).

The Petition for Certiorari states that Respondent knew about and assented to the reassignments made by the original assignee, Philip S. Rosen (p. 5). It should be emphasized, however, that it was never disclosed to Respondent what any of the subassignees such as Petitioner paid to Rosen. Respondent was told only that there were other persons who were making available some of the funds (R. 251-52, 385, 435).

ARGUMENT.

I.

PETITIONER WAS NOT DENIED A TRIAL OF ANY GENUINE ISSUES OF MATERIAL FACT.

Although the Petition for Certiorari does not clearly say so, what it seeks is a review by this Court of a determination by the courts below as to the New York law of usury. It asks that this Court conclude that the district court and the court of appeals below misapprehended the New York law because they failed to pay attention to some lower court decisions arguably at variance with earlier pronouncements of the highest courts of the state. Moreover, the aspect of the New York usury law as to which review is sought is a very narrow one: that dealing with assignments by remaindermen of dollar-amount interests in their remainders in the form of transactions labelled sales, in which the consideration received by the remaindermen is but a fraction of the value of their interests actuarily determined.

The New York Court of Appeals, the Appellate Divisions, the United States District Courts in New York, and the Court of Appeals for the Second Circuit have handed down a series of opinions dealing with the application of the New York usury statute to such transactions. These opinions were reviewed, analyzed, interpreted, and applied by the district court and court of appeals. Petitioner now asks this Court to say that the courts below "misinterpreted" New York law. That is the essence of this Petition for Certiorari.

When the Petitioner asserts, therefore, that he "has been denied a trial of genuine and material issues of fact"

(Pet. Cert. p. 6), he is necessarily insisting that these issues are material under New York law. To determine whether the courts below were correct in deciding the cause on summary judgment involves an examination of the New York authorities: for it was on their view of the New York law that the courts below concluded, for purposes of holding that the transactions should be treated as loans at a legal rate of interest, that there were no material issues requiring trial. When the district court stated that a limited trial might be necessary to determine the usury question, it was only indicating why it was not prepared, simply on the affidavits before it, to decide that the transactions were void for usury (R. 634). Furthermore, an important reason for the district court's reluctance was the consequence of a finding of usury (R. 628):

> The court's conclusion that a determination of the usury question would require a trial of these issues is based in considerable part on the circumstance that under the controlling New York statute, a holding that the assignments amounted to usurious loans would result in the forfeiture of both principal and interest.

At no point did the district court deny Petitioner a trial as to any material facts; it concluded only that, although there might be controverted issues of fact which would have to be tried if the court were to make a finding of usury, such issues need not be resolved one way or the other in view of the determination that the transactions should be treated as legal loans. In making this determination, the district court followed the decisions of the highest New York courts. And the court of appeals, in affirming the district court, expressed itself in this fashion (Pet. Cert. App. A, p. 30):

> In spite of a finding of usury, New York courts fashioned what seemed to them to be an equitable result requiring the assignor to pay the amount he had received, plus interest and costs. In other in-

> stances, the same result was achieved after considering but not determining the question of usury * * *
>
> We hold that under New York law as announced by various court decisions, the District Court was justified in fashioning the equitable remedy announced in the decree and judgment appealed from herein.

It is thus clear that the courts below interpreted and applied the New York law to the uncontroverted facts in the record. Other issues of fact—which the district court said might be controverted—were regarded as issues which need not be decided in view of the holdings of the New York courts.

Thus Petitioner, when he complains of the lack of a trial, is really contending that the courts below misinterpreted New York law. Before it may be said that Petitioner was denied a trial of genuine issues of fact, it must first be decided that the courts below were wrong about the New York decisions.

It follows that there is no federal question and no issue of any importance involving the federal rules of civil procedure; there is only the contention that the New York law of usury is not what the courts below concluded it to be. Respondent respectfully submits that the district court and court of appeals were not in error and that there is no conflict between their conclusions and the controlling New York authorities. See Point III below.

II.

THE LITIGANTS REMAINING IN THIS CAUSE ARE FEW IN NUMBER AND THEIR CLAIMS ARE SMALL IN AMOUNT. MOREOVER, THE ISSUES DEPEND UPON FACTS WHOLLY LACKING IN GENERAL SIGNIFICANCE.

As has already been mentioned above, the fragment of this litigation which Petitioner seeks to have this Court review is but a trifling part of what was once involved. Out of the eighty claimants who originally asserted their right to shares in Respondent's interest in the Otto Young Trust Estate, at the most five are left. And those five, including Petitioner, have claims totalling only $33,000, or about two per cent of the $1,633,250 in assignments at one time in litigation. Everything else was disposed of by the district court's decree of June 24, 1960, to which the Petitioner refers in his Petition (p. 6).

But even if the remaining segment of the litigation were not insignificant, the indisputable facts are that this cause has to do with a narrow aspect of the New York usury law and that it involves facts likely to be duplicated rarely if at all.

Diligent research by at least four different sets of counsel in this case has succeeded in uncovering exactly twenty-eight reported decisions by courts sitting in New York dealing with transactions even arguably similar to those involved here. These twenty-eight cases include decisions of the New York Court of Appeals, two of the Appellate Divisions, various trial and Surrogate's courts, federal district courts, and the Court of Appeals for the Second Circuit. Petitioner asserts (Pet. Cert. p. 13) that "assignments such as those involved in the present case are very common in the State of New York, and are frequently passed upon in one form or another as a matter of routine procedure in the New York courts." Nonetheless, all that

have been discovered by all counsel are twenty-eight reported decisions over a period of fifty-six years—or one decision every two years.

It is thus apparent that Petitioner desires review of issues that affect few people, that involve relatively small sums, and that are to be resolved by reference to an isolated area of New York law that has certainly not been an every-day subject of decision in that state—and New York is virtually the only state whose courts have given it attention at all.

Moreover, many of the facts upon which the applicability of the New York law depends are sufficiently peculiar to the case at bar as practically to preclude their recurrence. The facts which the trial court found to be uncontroverted on the basis of the affidavits before it related to the following (R. 596-608; 625-26): the nature of Respondent's interest—a vested remainder subject to being divested in the event that Respondent predeceased the life tenant, his mother, leaving issue him surviving; Respondent's age, that of his mother, and that of his son at the time of the assignments; the wording of the assignment documents themselves; the sums of money received by Respondent for the various assignments; the amount of insurance taken out by the original assignee in connection with the assignments and the premiums paid therefor; the subassignments made by the original assignee; the out-of-pocket sums anticipated by the original assignee, including the sums paid Respondent, insurance premiums, and interest, over the various life expectancy periods indicated for the life tenant.

Such facts can hardly be said to affect more than a handful of persons: a few remaindermen under long-lived testamentary trusts such as that of Otto Young, and a limited number of specialists who advance money to expectant heirs

and remaindermen on the security of assignments labelled sales.

III.

THE COURTS BELOW CORRECTLY INTERPRETED THE NEW YORK DECISIONS, AND THERE IS NO CONFLICT BETWEEN THEIR HOLDINGS AND THE LAW AS ENUNCIATED BY THE HIGHEST COURTS SITTING IN NEW YORK.

It is obvious that Petitioner disagrees with the manner in which the courts below interpreted the New York law. But other than indicating the nature of his disagreement (Pet. Cert. pp. 12-14), Petitioner does not call this Court's attention to a single decision, let alone any substantial body of precedent, in which the highest courts of New York have laid down rules of law plainly in conflict with the views expressed by the courts below. The cases mentioned by Petitioner were briefed in the courts below, they were brought to the attention of those courts by all parties, and they were carefully considered below. But because Petitioner does not accept the interpretation of New York law expressed by the district court and the court of appeals, he asks this Court either to correct "the erroneous application of state law" or to direct one of the courts "to determine such law in a proper manner". (Pet. Cert. p. 15). Yet Petitioner never gives the slightest indication as to what was erroneous about the manner in which the courts determined the New York law. There is no basis for asserting, certainly, that the courts below ignored any decisions of the highest courts in New York; nor is there any suggestion that they took into account decisional material they should have disregarded.

The rules to be adhered to by federal courts in determining state law are not open to serious dispute. A federal court is to look to the law as declared by the high-

st court of the state, except insofar as later decisions f that court show that it has modified its rulings. *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, 107 193.). When the highest court of a state has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted." *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 236 (1940). The decisions of intermediate appellate courts constitute data for ascertaining state law only where there is an absence of other persuasive data as to a different view by the highest state court. *Howard Foundry Co.* v. *Hartford Fire Ins. Co.*, 222 F. 2d 767, 769 (C. A. 7th, 1955), cert. den. 350 U. S. 885 (1955). Moreover, it is proper to give particular significance to the views of federal district courts and the court of appeals sitting in the state involved—here New York—in reaching a determination as to the controlling state law. Cf. *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280, 281 (1942); *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204-05 (1956).

The opinion of the court of appeals (Pet. Cert. App. A, pp. 25-30) and the opinion of the district court (R. 621-24, 630-33) mention and discuss the New York decisional material relied on. Petitioner has not shown that any of that material should not have been referred to. And clearly Petitioner could not, because those decisions are the expressions of the highest New York state courts and of the federal courts sitting in New York.[1]

1. The principal decisions are: *Mercantile Trust Co.* v. *Gimbernat*, 119 N. Y. Supp. 103 (App. Div. 1st Dept., 1909); *Otten* v. *Freund*, 135 N. Y. Supp. 59 (App. Div. 1st Dept., 1912); *Hall* v. *Eagle Ins. Co.*, 136 N. Y. Supp. 774 (App. Div. 1st Dept., 1912), aff'd without op. 211 N. Y. 507, 105 N. E. 1085 (1914); *Statesbury* v. *Huber*, 237 Fed. 413 (E. D. N. Y., 1916); *Provident Life & Trust Co.* v. *Fletcher*, 237 Fed. 104 (S. D. N. Y., 1916), aff'd 258 Fed. 583 (C. A. 2d, 1919); *Hartley* v. *Eagle Ins. Co.*, 222

Petitioner states (Pet. Cert. pp. 12-13) that since 1918 "nine reported cases of assignments of future interests have been decided by New York courts and only one has been held invalid, viz., *In re Reif's Will*, 30 N. Y. S. 2d 47 (1941)." What Petitioner omits to say is that none of the decisions relied on by the courts below have ever been expressly overruled (a concession which Petitioner made in his Petition for Rehearing, at page 8, in the Court of Appeals below). Petitioner likewise fails to say that the eight reported cases he now relies on do not include a single reported decision of the New York Court of Appeals or of a federal court sitting in New York. Rather, Petitioner's cases consist of several lower court decisions affirmed without opinion by one of the Appellate Divisions; a sketchy Surrogate's decision affirmed without opinion by an Appellate Division in which the New York Court of Appeals denied leave to appeal; two Appellate Division decisions, clearly distinguishable on the facts, affirmed without opinion by the New York Court of Appeals; and an assortment of trial court and Surrogate's rulings, some of which state virtually no facts.

Such is the data that Petitioner presented to the court of appeals below; presumably he desires this Court to look at it again. But apart from the circumstance that the courts below relied on the decisions of the highest courts of New York which Petitioner has acknowledged have not been overruled—Petitioner ignores certain fundamental New York rules as to the significance of "affirmances without opinion" and "denials of leave to appeal" in New York. When a New York court, on appeal, affirms without opinion, it does not adopt in its entirety what was said below. *Com'r of Public Welfare* v. *Jackson*, 265 N. Y. 440, 193 N. E. 262, reargument den. 265

N. Y. 178, 118 N. E. 622 (1918); *Brown* v. *Robinson*, 224 N. Y. 301, 120 N. E. 694 (1918); *Brown* v. *Fletcher*, 244 Fed. 854 (S. D. N. Y., 1917), aff'd 253 Fed. 15 (C. A. 2d, 1918).

N. Y. 469, 193 N. E. 275 (1934); *Adrico Realty Corp.* v. *City of New York*, 250 N. Y. 29, 164 N. E. 732 (1929); *Soderman* v. *Stone Bar Associates*, 146 N. Y. S. 2d 233, aff'd 159 N. Y. S. 2d 50, rehearing den. 160 N. Y. S. 2d 827 (1955). Moreover, a denial of leave to appeal by the New York Court of Appeals does not give to the order the value of a precedent. *Matter of Marchant* v. *Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 297-98, 169 N. E. 386 (1929).

Petitioner stubbornly refuses to acknowledge that the decisive consideration running through all the New York cases—as the courts below recognized—is the presence or absence of real hazard so far as the assignee is concerned. The best expression of that consideration is Judge Learned Hand's opinion in *Provident Life and Trust Co.* v. *Fletcher*, 237 Fed. 104, 108-09 (S. D. N. Y., 1916), aff'd 258 Fed. 583 (C. A. 2d, 1919), part of which was quoted by the court of appeals (Pet. Cert. App. A, p. 26):

> • • • the first question of law which arises is whether the transaction, without security of any life insurance policies, was usurious. • • • The general test is whether the principal is put at any genuine hazard. • • • A number of cases have come up in the state of New York similar to that at bar. • • • They have generally been held usurious, but in all cases which I have been able to find they have been so held because, under all the possible circumstances, the principal must be repaid. • • • In all these cases, either in one way or another, the payment of principal was secured beyond any but colorable hazard. Now it is quite clear that in the case at bar the parties started out, as I have said, upon a usurious transaction, and if Braker had been able to secure a policy of life insurance nothing could be said for its validity, because the principal would have been secured under all contingencies.

Petitioner is entitled personally to disagree with the

New York law as expressed by Judge Learned Hand and found by the courts below, but he is not justified, without more, in urging that their views are in error.

CONCLUSION.

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

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